IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No.....

JOSEPH C. LENIHAN AND JOSEPH P. KILROY, in their own behalf as subscribers and users of the services of The Tri-State Telephone and Telegraph Company, a corporation, and on behalf of all persons, corporations and associations within the Metropolitan Area of St. Paul, Minnesota, who are similarly situated and as may care to join in this action,

Petitioners,

and

CITY OF ST. PAUL, a municipal corporation,

Intervener-Petitioner,

vs.

THE TRI-STATE TELEPHONE AND TELEGRAPH COMPANY, a corporation,

and

CHARLES MUNN, HJALMAR PETERSEN AND FRANK W. MATSON, individually and as members of the Railroad and Warehouse Commission, The Railroad and Warehouse Commission of the State of Minnesota, J. A. A. BURNQUIST, individually and as Attorney General of the State of Minnesota,

Respondents.

PETITIONERS' ASSIGNMENT OF ERRORS AND BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Supreme Court of the State of Minnesota erred in this cause in its said opinion and final judgment in the following particulars:

(1) The said State Supreme Court erred in its construction of Sec. 5291, Mason's Minn. St. of 1937, to the effect that the same permitted the Railroad and Warehouse Commission of the State of Minnesota to prescribe telephone rates by its said order of May 2, 1939, without notice, hearing, evidence, findings of fact upon evidence or a supporting record capable of judicial review. (Rec. Proc. St. Sup. Ct. pp. 1-20 incl.; pp. 11 to 16 incl.).

(2) The said State Supreme Court erred in holding that said Commission might lawfully, by its order based solely upon the agreement between said Commission, the Attorney General of said state and the Companies to be regulated, evidenced only by its recitals, prescribe and promulgate rates and charges for telephone service (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16 to 20 incl.).

(3) The said State Supreme Court erred in holding that said Commission might lawfully enter its order without notice, hearing, evidence, or findings based on evidence modifying and increasing established telephone rates. (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp 16 to 23).

(4) The said State Supreme Court erred in holding that said Commission was empowered to alter and increase the rates prescribed by its previous order, then the subject of a pending appeal in said State Supreme Court after the decision upon such appeal affirming the judgment of the District Court adjudicating the rates prescribed by said previous order reasonable and not confiscatory, without the institution of any proceeding therefor, without notice, hearing, evidence or findings based on evidence or

any purported finding that such pre-existing rates were unreasonable (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16 to 20 incl.).

(5) The said State Supreme Court erred in holding that said Commission was empowered to wrest the previous litigated case involving its order of March 31, 1936, from the jurisdiction of the State Supreme Court and to make and enter its said assailed order of May 2, 1939, without any supporting proceeding, superseding and increasing the rate schedule for the said City of Saint Paul Metropolitan Area prescribed by said litigated order of March 31, 1936. (Rec. Proc. St. Sup. Ct. pp 1 to 20 incl.; pp. 16 to 20 incl.).

(6) The said State Supreme Court erred in not affirming the judgment of the District Court of Ramsey County, Minnesota, dated December 15, 1939, in this cause, adjudicating said assailed order as void and unenforceable insofar as the same purported to prescribe telephone rates in excess of those prescribed for said last mentioned metropolitan area by the Commission's litigated order of March 31, 1936 (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(7) The said State Supreme Court erred in entering and docketing its judgment reversing said District Court judgment (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(8) The said State Supreme Court erred in holding that said Commission was empowered, solely by virtue of a composition made to the exclusion of the City of Saint Paul, a party intervener in the litigation involving its previous order of March 31, 1936, to supersede and increase the rates prescribed by its said order of March 31, 1936.

(Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16 to 20 incl.).

(9) The said State Supreme Court erred in holding that said Commission was, by virtue of said Sec. 5291, empowered to dispense with the statutory procedural standards for notice, hearing, the reception of evidence, findings of fact and the compilation of a record capable of judicial review and to enter its order prescribing increased rates upon the proposal therefor by the utility to be thereby regulated (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 12, 13).

(10) The said State Supreme Court erred in not holding that the assailed order was invalid and ineffective as involving the usurpation and exercise by the Commission of pure legislative power, in disregard of the minimal requirements of due process demanded by Section I of the Fourteenth Amendment to the Federal Constitution (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(11) The said State Supreme Court erred in not holding that said Commission was a mere administrative body exercising quasi-judicial powers, circumscribed therein by Federal Constitutional requirements for notice, hearing, evidence and findings of fact based on evidence, conditional to the making of a valid order fixing rates (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl. pp. 13 to 16 incl.).

(12) The said State Supreme Court erred in holding that said assailed order of May 2, 1939 conformed to the due process provisions of the Fourteenth Amendment to the Federal Constitution (Rec. Proc. St. Sup. Ct. pp. 1-20 incl. pp. 29, 30).

(13) The said State Supreme Court erred in not holding that said order of said Commission, dated May 2,

1939, violated the due process requirements of the Fourteenth Amendment to the Federal Constitution and infringed upon the rights of the subscribers and patrons of The Tri-State Telephone and Telegraph Company, and the public, guaranteed and secured to them by Section I of the said Federal Constitutional Amendment (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(14) The said State Supreme Court erred in not holding said Sec. 5291, as the same was construed by the State Supreme Court, in this cause, unconstitutional and in violation of the Fourteenth Amendment to the Federal Constitution (Rec. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16-20 incl.).

(15) The said State Supreme Court erred in holding that in the enactment of said assailed order, said Commission might substitute for the minimal requirements of a valid rate order, a compromise on the footing of convenience or expediency or because of a natural desire to be rid of harassing delay, and to thereby prescribe a uniform schedule of rates for two separate and distinct telephone exchange units operated and owned in separate metropolitan areas by separate companies, without any rate investigation pertinent to either (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 16 to 20 incl.).

(16) The said State Supreme Court erred in not holding that said assailed order was arbitrary, baseless and in violation of the said due process provisions of the Fourteenth Amendment to the Federal Constitution and a denial of the rights of subscribers and patrons of the companies thereby sought to be regulated (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 29, 30).

(17) The said State Supreme Court erred in holding that said assailed order was not vitiated by reason of absence of notice to the petitioner, City of Saint Paul, and its non-participation in the alleged agreement which the order recited as its sole base (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; p. 18).

(18) The said State Supreme Court erred in holding that the said Commission was empowered, as the representative of the public and the subscribers and patrons of the companies purported to have been affected by said assailed order, to agree with such companies for the prescription of the rates thereby purported to be promulgated, without compliance with the minimal requirements of due process demanded in such cases by the Fourteenth Amendment to the Federal Constitution as the same has been construed and applied by the decisions of this Honorable Court (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.).

(19) The said State Supreme Court erred in not holding said assailed order unconstitutional and in violation of the minimal requirements of the Fourteenth Amendment to the Federal Constitution, since the same was admittedly entered without the institution of any rate proceeding by the Commission, without any notice, hearing, evidence or findings of fact based on evidence, or record capable of judicial review respecting the reasonableness of said order or the rates thereby purported to have been prescribed and promulgated.

BRIEF.

In Support of Petition for Writ of Certiorari.

The Applicable State Statutes Delegating the rate making power, here in question, to the Railroad and Warehouse Commission of the State of Minnesota are contained in Chapter 152, Minnesota Sessions Laws, 1915, as amended (Mason's Minnesota Statutes, 1927, Chapter 28 A-1, Sections 5286-5319 inclusive and amendments).

Section 5289 of said Statutes provides:

> "It shall be the duty of every telephone company to furnish reasonably adequate service and facilities for the accommodation of the public, and its rates, tolls and charges shall be fair and reasonable for the intrastate use thereof. All unreasonable rates, tolls and charges are hereby declared to be unlawful."

Section 5291 of said Statutes provides:

> "Whenever such rates or schedules are found to be unreasonable by the commission, upon its own motion or upon complaint, it shall prescribe reasonable rates to take the place of those found unreasonable and such new rates shall be filed in place of the rates or schedule superseded. No rates filed with the commission shall be changed by any telephone company without an order of the commissioner sanctioning the same. It shall be unlawful for any telephone company to collect or receive a greater or less rate or charge for any intrastate service rendered by it than the rate or charge named in the schedules on file with the commission, and no new rate shall take effect till the date named by the commission, which shall not be less than ten days after it is filed."

Section 5298 of said Statutes as pertinent here provides:

> "The commission shall, whenever it deems the same necessary, determine the value of all the property of any telephone company devoted to the public use, and in so doing it shall, after notice to the telephone company, hold such public hearing as will give all interested parties a chance to furnish evidence and be heard. For the purpose of this act the commission is authorized to appoint engineers, examiners, experts, clerks, accountants and other assistants as it may deem necessary at such rates of compensation as it may prescribe."

Section 5304 of said Statutes, as construed by said State Supreme Court *In re*: *Northwestern Bell Telephone Co.*, 164 Minn. 279, 283, provides that, in each such case, telephone exchange units shall be dealt with separately.

Section 5307 of said Statutes, respecting rate proceedings conducted by the Commission, provides as follows:

> "A full and complete record shall be kept by the commission of all proceedings had before it upon any formal investigation or hearing and all testimony received or offered shall be taken down by the stenographer appointed by the commission and a transcribed copy of such record shall be furnished to any party to such investigation upon the payment of the expense of furnishing said transcribed copy.
>
> "Whenever an appeal is taken from any order of the commission under the provisions of this act, the commission shall forthwith cause a certified transcript of all proceedings had, of all pleadings and files, and all testimony taken or offered before it upon which such order was based, showing particularly what, if any evidence, offered was excluded, to be made and filed with the clerk of the district court where such appeal is pending."

Section 5308 of said Statutes pertinent to such rate proceedings, provides:

> "Any party to a proceeding before the commission or the attorney-general may make and perfect an appeal from such order as provided in Sections 1971-1972, Revised Laws of 1905, and acts amendatory thereof." "Upon such appeal being so perfected it may be brought on for trial at any time by either party upon ten days' notice to the other and shall then be tried by the court without the intervention of a jury, and shall be determined upon the pleadings, evidence and exhibits introduced before the commission and so certified by it."

The State Commission, in making the assailed order, without a supporting proceeding, in disregard of the minimal requirements of due process, violated the Federal Constitutional Inhibitions of the Fourteenth Amendment, to the prejudice of the Public and Telephone users.

The assailed order purports to prescribe uniform rates applicable to the City of Saint Paul Metropolitan Area, wherein The Tri-State Telephone and Telegraph Company is the operating utility, and the City of Minneapolis Metropolitan Area, wherein the Northwestern Bell Telephone Company is the operating utility, without any rate proceeding relative to either (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; pp. 5 to 10 incl.).

The assailed order admittedly was made without the institution by said Commission of any proceeding therefor, without notice of hearing, without the conduct of a hearing, without the reception of any evidence, without any findings of fact based upon evidence or a record for its

support capable of judicial review and a determination thereon relative to the reasonableness of the same or the rates thereby prescribed (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.; 16 to 20 incl.) (Rec. pp. 82, 83, 91, 111).

The assailed order owes its sole support to its recitals to the effect that it represented a compromise effected by and between the Commission, the Attorney General of the State and said Companies, the Companies agreeing to accept the rate schedules incorporated in said order, and The Tri-State Telephone and Telegraph Company further agreeing to desist from further attempts to litigate the Commission's previous order of March 31, 1936, made after protracted litigation pertaining to the City of Saint Paul Metropolitan Area, adjudicated upon appeal as reasonable and not confiscatory by the judgment of the District Court of Ramsey County, Minnesota, which judgment, upon appeal to said State Supreme Court, was affirmed by the decision of the Court dated February 24, 1939, (State vs. Tri-State Tel. & Tel. Co., 284 N. W. 294) such appeals having been taken by The Tri-State Telephone and Telegraph Company, and the latter appeal then pending in the said State Supreme Court upon a stay of proceedings whereby the entry of final judgment pursuant to said decisions was suspended to permit the appellant to seek a re-argument or relief by way of review in the Supreme Court of the United States (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The previous proceeding embracing the order of the Commission dated March 31, 1936, was instituted by the Commission upon its own initiative and its order dated February 15, 1932, and related only to the prescription of telephone rates chargeable by The Tri-State Telephone and

Telegraph Company in the City of Saint Paul Metropolitan Area. This proceeding, by the appeal of the Company from the Commission's order to the District Court of Ramsey County, Minnesota, was effectively transferred from the jurisdiction of the Commission to the courts where the same was pending in the State Supreme Court when the assailed order dated May 2, 1939 was so made and entered by the Commission (Rec. Proc. St. Sup. Ct. pp. 1 to 4 incl.).

The assailed order so made, purported to prescribe a schedule of rates chargeable by The Tri-State Telephone and Telegraph Company, applicable to the City of Saint Paul Metropolitan Area, appreciably in excess of those prescribed by the litigated order of the Commission, that dated March 31, 1936, made in a separate and distinct proceeding which was the subject of the aforesaid appeals respectively to the State District and Supreme Courts. (Rec. pp. 39, 40, Dist. Ct. Mem.)

The assailed order, emphasizes its lack of respect for the minimal requirements of the due process provisions of the Fourteenth Amendment to the Federal Constitution as the same have been construed and applied by this Honorable Court respecting the necessity for notice, hearings and orders based upon evidence taken and recorded so as to permit judicial review of the rates prescribed, since it contains no finding or purported finding that any of the rates fixed by the previous litigated order was unreasonable or unjust (Rec. Proc. St. Sup. Ct. pp. 5 to 10 incl.).

The Statute, Section 5289 hereinabove quoted, secures to the public and patrons and users of telephone service rendered by a public utility governed by said act, the right to reasonably adequate service to be furnished as a mat-

ter of duty thereby imposed upon the Company, at fair and reasonable rates.

The order of the Commission prescribing a schedule of telephone rates applicable to any metropolitan area must be founded, upon competent evidence and findings of fact pertinent to the factors necessarily employed in the establishment of rates and a record capable of judicial review respecting the reasonableness of the rates prescribed, both as regards the Company and its patrons and the public.

Chicago, M. & St. P. R. Co. v. State of Minn., 33 L. Ed. 970, 981; 134 U. S. 418, 458.

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."

Western Buse Tel. Co. v. N. W. Bell Tel. Co., 188 Minn. 524, 539,

"Law contemplates much mutual understanding and appreciation between a telephone company and its patrons. The company's business is given a monopolistic character and is almost assured a reasonable rate upon the value of its property, a protection not enjoyed by private business. The income is not large or speculative, but conservative and quite certain. On the other hand, the patron is protected from exorbitant rates. * * * The patrons are entitled to demand service, and the company must comply. It is entitled to just compensation; no more."

The assailed order does not purport to be based upon any finding of fair value of the property of either Company used or useful in the rendition of the service for which rates are thereby prescribed, or any finding pertaining to operating expenses or revenues derived or to be derived by either Company, or any finding based upon any evidence, though reference is made therein to resort by the Commission to undisclosed and unrecorded information and said order is expressly, by its recitals, limited for its support to impertinent or irrelevant considerations and matters; convenience and avoidance of delay and expense attendant upon requisite rate investigations, the willingness of the Companies to accept the rates prescribed without protest, and the termination of attempts on the part of one of the Companies to further litigate respecting a separate and distinct proceeding (Rec. Proc. St. Sup. Ct. pp. 5 to 10 incl.).

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393,

"As the District Court did not deal with the issue of confiscation and the evidence is not before us, we are concerned only with the question of procedural due process, that is, whether the commission in its procedure, as distinguished from the effect of its order upon respondent's property rights, failed to satisfy the requirements of the Federal Constitution. We examine this question in the light of well settled principles governing the proceedings of rate making commissions. *The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement.* Ohio Bell Teleph. Co. v. Public Utilities Com., 301 U. S. 292, 304, 305, 81 L. Ed. 1093, 1101, 1102, 57 S. Ct. 724. There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of

fair trial, and the commission must act upon evidence and not arbitrarily. Interstate Commerce Com. v. Louisville & N. R. Co., 227 U. S. 88, 91, 57 L. Ed. 431, 433, 33 S. Ct. 185; St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 51, 73, 80 L. Ed. 1033, 1041, 1052, 56 S. Ct. 720; Morgan v. United States, 298 U. S. 468, 480, 481, 80 L. Ed. 1288, 1294, 1295, 56 S. Ct. 906; Ohio Bell Teleph. Co. v. Public Utilities Com., 301 U. S. 292, 81 L. Ed. 1093, 57 S. Ct. 724, supra."

The due process provisions of the Federal Constitution applicable to such proceedings require that a state Commission, in the prescription of public utility rates, must act upon competent evidence taken and recorded in the proceeding from which its order emanates. The commission may not base any order prescribing rates upon information not incorporated in the form of competent evidence in its record.

Ohio Bell Teleph. v. Public Utilities Com., 81 L. Ed. 1093, 1100, 1101; 301 U. S. 292, 302, 303,

"There has been more than an expansion of the concept of notoriety beyond reasonable limits. From the standpoint of due process—the protection of the individual against arbitrary action—a deeper vice is this, that even now we do not know the particular or evidential facts of which the commission took judicial notice and on which it rested its conclusion. Not only are the facts unknown; there is no way to find them out. When price lists or trade journals or even government reports are put in evidence upon a trial, the party against whom they are offered may see the evidence or hear it and parry its effect. Even if they are copied in the findings without preliminary proof, there is at least an opportunity in connection with a judicial

review of the decision to challenge the deductions made from them. The opportunity is excluded here. The commission, withholding from the record the evidential facts that it has gathered here and there, contents itself with saying that in gathering them it went to the journals and tax lists, as if a Judge were to tell us, 'I looked into the statistics in the Library of Congress, and they teach me thus and so.' This will never do if hearings and appeals are to be more than empty forms."

The Minnesota Statute, Section 5308, above quoted, limits a judicial review of an order of the Commission prescribing rates to a review and a determination upon the pleadings, evidence and exhibits introduced before the Commission and so certified by it.

The assailed order made as aforesaid, without any evidence for its support, is incapable of judicial review respecting the rates thereby purported to be prescribed. This results in a denial of due process to the public and patrons and users of telephone service rendered by the regulated utility company, since neither the order nor any supporting record of the Commission affords any basis upon which the Court might predicate a determination upon review relative to the reasonableness of said Order or such rates. (Rec. Proc. St. Sup. Ct. pp. 5 to 10 incl.).

Ohio Bell Teleph. Co. v. Public Utilities Co., supra, 81 L. Ed. page 1101, 301 U. S. pages 303, 304,

"In Ohio the sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. In such circumstances judicial review would be no longer a reality

> if the practice followed in this case were to receive the stamp of regularity. To put the problem more concretely: How was it possible for the appellate court to review the law and the facts and intelligently to say that the findings of the Commission were supported by the evidence when the evidence that it approved was unknowable. * * * What the Supreme Court of Ohio did was to take the word of the Commission as to the outcome of a secret investigation, and let it go at that. 'A hearing is not judicial, at least in any adequate sense, unless the evidence can be known.' (Citing cases)."

The assailed order makes veiled references to certain investigations conducted pertinent to the situation of the Companies, without any disclosures as to how the same were conducted or what the same divulged. The order emanated from a cloistered or secret conference of the Commission, the Companies affected, and the Attorney General, to the exclusion of the public and the City of Saint Paul, the latter being a party intervener in the proceeding which embraced the Commission's order of March 31, 1936. The order could find no validity in anything that was the subject of its recitals since the same had no evidence for its support (Rec. Proc. St. Sup. Ct. pp. 5 to 10 incl.). (Rec. 136, 137, Dist. Ct. Mem.).

Ohio Bell Teleph. Co. v. Public Utilities Com., supra, 81 L. Ed. pages 1101, 1102; 301 U. S. pages 304, 305,

> "Regulatory commissions have been invested with broad powers within the sphere of duty assigned to them by law. Even in quasi-judicial proceedings their informed and expert judgment exacts and receives a proper deference from the courts when it has been reached with due

submission to constitutional restraints. (Citing cases.) Indeed, much that they do within the realm of administrative discretion is exempt from supervision if those restraints have been obeyed. All the more insistent is the need, when power has been bestowed so freely, that the 'inexorable safeguard' (St. Joseph Stock Yards Co. v. United States, 298 U. S. 38, 73, 80 L. Ed. 1033, 1052, 56 S. Ct. 720) of a fair and open hearing be maintained in its integrity. Morgan v. United States, 298 U. S. 468, 480, 481, 80 L. Ed. 1288, 1294, 1295, 56 S. Ct. 906; Interstate Commerce Com. v. Louisville & N. R. Co., 227 U. S. 88, 57 L. Ed. 431, 33 S. Ct. 185, supra. The right to such hearing is one of 'the rudiments of fair play' (Chicago M. & St. P. R. Co. v. Polt, 232 U. S. 165, 168, 58 L. Ed. 554, 555, 34 S. Ct. 301) *assured to every litigant by the Fourteenth Amendment as a minimal requirement.* West Ohio Gas Co. v. Public Utilities Com. (No. 1), (No. 2), 294 U. S. 63, 79, 79 L. Ed. 761, 773, 55 S. Ct. 316, 324, supra; Brinkerhof-Ferris Trust & Sav. Co. v. Hill, 281 U. S. 673, 682, 74 L. Ed. 1107, 1114, 50 S. Ct. 451. See f. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 77 L. Ed. 796, 53 S. Ct. 350, supra. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

The State Supreme Court, by its decision and final judgment, denied Federal right specialty set up by the Petitioners-Plaintiffs as subscribers and users of telephone service rendered by the Tri-State Telephone and Telegraph Company and on behalf of others similarly situated, secured to them by Section I of the Fourteenth Amendment to the Federal Constitution.

The petitioners, in the State Courts, as subscribers and users of telephone service rendered by The Tri-State Telephone and Telegraph Company in the City of Saint Paul Metropolitan Area, on their own behalf and on behalf of others similarly situated, by their complaint served and filed in the District Court of Ramsey County, Minnesota, in this cause, specially set up their right to due process in the matter of the assailed order and to insist upon compliance by the Commission to the minimal requirements of due process respecting the order of the Commission fixing rates for telephone service applicable to said area. The complaint specifically, and in detail, pointed out the fatal deficiencies in the proceedings which attended the making of the assailed order, hereinabove enumerated, and alleged that said assailed order did not conform with the due process provisions of the Federal Constitution (Rec. pp. 1 to 33 incl. Complaint.) (Rec. pp. 8, 9, 10, 11).

The pleadings of the parties to this cause affirmatively established the fact that the assailed order was unattended by any notice, hearing, evidence or findings upon evidence. These fatal deficiencies are apparent from the face of the assailed order and its recitals. The Tri-State Telephone and Telegraph Company, in paragraph ten of its answer in the District Court, in this cause, admitted that said assailed

order was unsupported by any evidence and denied that any such support was necessary to its validity, and further denied that the Commission was required to have or consider anything more than its said assailed order of May 2, 1939, shows it to have had and considered. The following is said paragraph ten of said Answer: (Rec. pp. 28 to 33 inc. Order; 1 to 33 incl. Complaint; 78 to 120 Ans. & Repl.)

> "This defendant admits no formal testimony was taken from sworn witnesses and hence there was no formal examination of witnesses and no transcript of evidence as such. Defendant denies that such were necessary, or that the Commission was required to have or consider anything more than said order of May 2 shows it to have had and considered." (Record pp. 82 and 83.)

The said District Court in this cause granted the petitioners-plaintiffs' motion, in which the petitioner-intervener, City of Saint Paul joined, for judgment on the pleadings and, pursuant thereto, the judgment of said District Court was entered and docketed December 15, 1939, adjudging and declaring said assailed order invalid and unenforceable, insofar as the same purports to prescribe rates applicable to said Metropolitan Area of the City of Saint Paul in excess of the rates prescribed therefor by the said prior order of the Commission dated March 31, 1936. (Rec. pp. 125 to 144 incl.)

The Tri-State Telephone and Telegraph Company, defendant-appellant, in this cause, in the State Supreme Court, alone appealed from said District Court judgment. The Railroad and Warehouse Commission of the State of Minnesota and the Attorney General of said State, the other defendants, in this cause, in said District Court, took no appeal from said District Court judgment and, to all

intents and purposes, acquiesced therein. (Rec. Proc. St. Supt. Ct. 1-20 incl. Rec. 145, 146).

The Federal question thus presented for decision by the petitioners, plaintiffs-respondents, in this cause, in the State Supreme Court, was presented for decision to the highest court of the State having jurisdiction, upon the said appeal from said District Court judgment, and the decision of said Federal question was necessary to the determination of this cause, and it was actually decided, and the final judgment as rendered by said State Supreme Court, in this cause, could not have been given without deciding it. (Rec. Proc. St. Sup. Ct. 1-20 incl. pp. 29, 30).

The opinion of the State Supreme Court, in this cause, though it makes no specific reference to the petitioners' claim of a Federal right or to the Federal question presented upon said appeal for its decision, demonstrates that the State Supreme Court did confront and decide said Federal question adversely to the claims of the petitioners and in a manner so as to deny the Federal right which the petitioners asserted on their own behalf as such subscribers of said Company and on behalf of all others similarly situated, including the intervener City of Saint Paul. This fact is apparent from the following quoted portion thereof:

> "The theory of plaintiffs and the trial court, as set forth in the learned memorandum of 28 pages accompanying the order over-ruling defendants' demurrer to the complaint and the order for judgment on the pleadings, is that the order of May 2, 1939, is void because there was no notice of hearing, no testimony taken, and no findings of fact contained therein sufficient in law to sustain it. The company's view of Sec. 5291 is that it has the right at any time to propose a new schedule of rates in place of the one in operation pro-

vided it is approved or sanctioned by the commission. * * * The commission in determining whether the proposed new schedule of rates is just and reasonable need not necessarily have a valuation of the company's property and a tedious and expensive litigation. It may already have knowledge of the situation. No statute is pointed to which prescribes that there must be notice given of hearings and testimony taken if the commission has all the necessary information for determining whether the rates proposed to supersede those in force are just and reasonable. * * * It should be noted that the commission in sanctioning proposed changes of rate schedules is performing a legislative function delegated to it. In so doing it represents the public—the patrons of the public utility. The patrons or users of the company's services have no vested rights to any fixed rates." (Record Proc. St. Sup. Ct. pp. 12, 13.)

The said State Supreme Court, by its said decision, stated further:

"*But it appears to us that regardless of the fact that the order of May 2, 1939, was made without notice of hearing, without the taking of testimony, and the claimed deficiency as to findings, it is nevertheless valid.* The original litigation, instituted by the commission against the company in 1929, was still pending and there was almost a certainty that it would be carried to the United States Supreme Court. Parties to litigation have the right to compose and agree to settle the dispute at any stage of the proceeding. There can be no doubt from the pleadings and the commission's orders that the commission and the company did agree to settle the litigation then pending by superseding the company's rate schedule as fixed by the order of March 31, 1936, by that of the order of May

2, 1939. The attorney general conducted the litigation in behalf of the commission, and also advised it in respect to the settlement thereof, by the order of May 2, 1939. The litigation had been carried on for over nine years at great expense. The commission had heard voluminous testimony upon all phases that enter into the reasonableness of the company's rates. It knew what had transpired since such testimony was submitted in 1934. There is not the slightest hint in the record or in the argument of counsel that the agreement to end the litigation was not made in the utmost good faith. The commission (representing the public and the users of the company's services) and the company were the necessary parties to that litigation. The expenses had been enormous. More were in sight, together with uncertainty and delay, if the company's grievances were carried to the Supreme Court of the United States. * * *

We do not think the city's non-participation in the settlement of the litigation vitiated the order made pursuant thereto; for, as stated, its interests were represented by the commission and attorney general." (Record Proc. St. Sup. Ct. pp. 10 to 18 incl.).

The pleadings, the orders, memoranda and judgment of the District Court, and the record respecting the proceedings in the State Supreme Court, in this cause, demonstrate that the petitioners therein seasonably presented a Federal question for decision to the highest court of the state having jurisdiction, that its decision of the Federal question was necessary to the determination of the cause and that it was actually decided, and that the final judgment of said Supreme Court, as rendered, could not have been given without deciding it. (Rec. pp. 1 to 35 incl., 78 to 120 incl., pleadings, 38 to 44 incl., 51 to 77 incl., 129 to 141 incl.,

Dist. Ct. Mem.) (Rec. Proc. St. Sup. Ct. pp. 1 to 22 incl.).

This Honorable Court *in re Chicago B. & Q. R. Co. v. Illinois ex rel. Grimwood,* 50 L. Ed. 596, 604; 200 U. S. 561, 580, 581, respecting the question of whether or not a Federal right set up had been presented for decision and had been decided in said cause, said:

> "Therefore a failure to recognize such Federal right or immunity, and the decision of the case on some ground of general or local law, necessarily has the same effect as if the claim of Federal right or immunity had been expressly denied. That claim having, then, been distinctly set up by the company and being broad enough to cover the entire case, it may not be ignored, and this court cannot refuse to determine whether the alleged Federal right exists and is protected by the Constitution of the United States. If the case had been decided in favor of the railway company on some ground of general or local law, then the claim of Federal right would become immaterial and we would not have re-examined the judgment. But the decision was otherwise, and was, in law a denial of the claim of a Federal right."

The petitioners respectfully submit that the record demonstrates that the said State Supreme Court, in this cause, has decided a Federal question of substance, seasonably presented for decision, not theretofore determined by the Supreme Court of the United States, or has decided it in a way not in accord with the applicable decisions of this court and adversely to the claims of the petitioners and in a manner so as to deny the Federal right thereby claimed by the petitioners as patrons of the regulated utility, on their own behalf and on behalf of others similarly situated,

and so as to deprive them of their property without due process of law, in violation of Section I of the Fourteenth Amendment to the Federal Constitution (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl.).

The Public and Users of the Services of the Regulated Public Utility, in the matter of the Prescription of Rates, have a Federal Constitutional right to be protected against exhorbitant or excessive rates on a parity with the right of the Regulated Public Utility to be protected against inadequate rates, by virtue of the Fourteenth Amendment to the Federal Constitution.

The right of the public and patrons of the regulated public utility to reasonable rates for public utility service and to be protected against excessive charges therefor, is equivalent to that of the regulated utility to compensatory rates and to protection against inadequate rates, since both are secured by Section I of the Fourteenth Amendment to the Federal Constitution.

The public and the users of public utility service in the matter of the prescription of rates, by order of a state rate making commission such as the Railroad and Warehouse Commission of the State of Minnesota, possess a right secured to them by said amendment to the Federal Constitution to insist upon the Commission's compliance with the minimal requirements of due process provided to be afforded by said constitutional amendment as the same has been construed and applied in the decisions of the United States Supreme Court.

Railroad Com. of Cal. v. Pacific G. & E. Co., 82 L. Ed. 319, 322; 302 U. S. 388, 392, 393;

Ohio Bell Teleph. Co. v. Public Utilities Com., 81 L. Ed. 1093, 1101, 1102; 301 U. S. 292, 302 to 305 incl;
Interstate Commerce Com. v. Louisville & N. R. Co., 57 L. Ed. 431, 433, 434; 227 U. S. 88, 91;
St. Joseph Stock Yards Co. v. United States, 83 L. Ed. 1033, 1041, 1052; 298 U. S. 38, 73;
Morgan v. United States, 80 L. Ed. 1288, 1294, 1295; 298 U. S. 468, 480, 481;
Smith v. Ames, 42 L. Ed. 819, 842, 847, 848, 849; 169 U. S. 466, 527, 528, 540, 541, 543, 544, 545, 546, 547.

This right of the public and the users of public utility service is substantial. The order here assailed was made without notice, hearing, evidence or any supporting record capable of judicial review for a determination upon the reasonableness of the rates thereby purported to be prescribed, and thus the same was made and entered in disregard of the minimal requirements of such due process provisions and in denial and violation of the right secured to the petitioners as such patrons of the regulated utility and others similarly situated.

"Counsel for the city lays some stress upon Michel v. Illinois Bell Teleph. Co. (1922) 226 Ill. App. 50, 53. But the gist of that case, so far as this question is concerned, may well be stated in the following excerpt from the opinion: 'This is not a case in which the court was called upon to fix a rate, or to determine what was a reasonable rate. The only purpose of the bill was to restrain, by injunction, an alleged unauthorized rate from being put into force and effect.'
* * *

"Of course there are many legal rights the subscriber may enforce in the courts. He must not be unjustly discriminated against, and he may even chal-

> lenge an order of the Commission made in excess of its powers or void for other reasons, and he may, as in the Michel case, supra, enjoin the utility from demanding an unauthorized rate."
>
> City of Birmingham v. So. Bell Tel. & Tel. Co. et al. 176 So. 301, 306, 307.

The said State Supreme Court, in this cause, in determining the Federal question presented by these petitioners for its decision, decided the same adversely to the claims of these petitioners and in denial of their asserted right to insist upon the Commission's compliance with such minimal requirements of said due process provisions as a condition precedent to the making and entering of the assailed order. The said State Supreme Court, in thus determining such Federal question and denying said right asserted and presented for determination by the petitioners, construed the State Statute, hereinabove quoted, Sec. 5291, as permitting the said Commission to alter and increase established rates, without any supporting evidence or record capable of judicial review respecting the reasonableness of the rates thus prescribed as a substitute for the established rates, and to substitute for that required as the minimal by said due process provisions, undisclosed and unrecorded information, the stipulation of the Commission and the Company to be regulated by the new schedule and matters of convenience and expediency, and desire to be rid of harassing delay. (Rec. Proc. St. Sup. Ct. pp. 16, 17, 18).

The statute, as thus construed, is palpably unconstitutional since it manifestly does not, as so construed, provide such due process to the public or users of the public utility service who must pay the rates to be prescribed.

The decision and final judgment of the said State Supreme Court, in this cause, amount to a reversal of the said State Supreme Court's former decision upon the same subject. The said State Supreme Court, in its said decision of February 24, 1939 involving the order of said Commission dated March 31, 1936 *State v. Tri-State Telephone and Telegraph Co.,* 284 N. W. 294, 300, 301, 303, in construing said State Statutes, announced the following rules:

> "Reduced to its simplest terms, the purpose of a judicial inquiry into an administrative proceeding is to determine whether the substantial rights of the parties are invaded. Chicago & G. T. Ry. Co. v. Wellman, 143 U. S. 339, 12 S. Ct. 400, 36 L. Ed. 176; Los Angeles G. & E. Corp. v. Railroad Commission, 289 U. S. 287, 53 S. Ct. 637, 77 L. Ed. 1180; Dayton P. & L. Co. vs. Public Utilities Commission, 292 U. S. 290, 54 S. Ct. 647, 78 L. Ed. 1267."
>
> "The Commission's obligation to make findings in rate proceedings is doubly apparent. To avoid the charge of unlawful delegation of authority to fix rates, the legislature must condition its exercise by the Commission, and adherence to the statutory standards must appear in the record of the Commission's act. Minneapolis & St. P. S. R. Co. vs. Birchwood, 186 Minn. 563, 244 N. W. 57; Wichita R. & L. Co. vs. Public Utilities Commission, 260 U. S. 48, 43 S. Ct. 51, 67 L. Ed. 124; Mahler v. Eby, 264 U. S. 32, 44 S. Ct. 283, 68 L. Ed. 549; St. Louis & O'F. R. Co. v. United States, 279 U. S. 461, 49 S. Ct. 384, 73 L. Ed. 798; United States v. Chicago, M. St. P. & P. R. Co. 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570, 97 A. L. R. 947. Due process demands that rates be fixed only after a hearing at-

tended by at least the rudiments of fair play. The Commission is in consequence required to base its decision upon the evidence and arguments disclosed at the hearing; its order must be supported by findings of fact which are in turn sustained by the evidence. Interstate Commerce Commission v. Louisville & N. R. Co., 227 U. S. 88, 33 S. Ct. 185, 57 L. Ed. 431; West Ohio Gas Co. vs. Public Utilities Commission, 294 U. S. 63, 55 S. Ct. 316, 79 L. Ed. 761; Acker vs. United States, 298 U. S. 426, 56 S. Ct. 824, 80 L. Ed. 1257; Ohio Bell T. Co. v. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093; Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319."

"Recitals in the order of submission to the statutory rules of procedure and decision are inconclusive; compliance with the legislative standard must be evident from the findings of the Commission. Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 30 S. Ct. 417, 54 L. Ed. 608; Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288. Likewise in the case of due process the single finding that existing rates are unreasonable is a conclusion and insufficient unless supported by findings of fact more particularly stated which demonstrate the grounds upon which the conclusion is based so that the court may determine whether the order proceeds from a conscientious consideration of the evidence or is arbitrary. Western Buse T. Co. v. Northwestern Bell T. Co., 188 Minn. 524, 248 N. W. 220; United States v. Chicago, M. St. P. & P. R. Co., 294 U. S. 499, 55 S. Ct. 462, 79 L. Ed. 1023; Ohio Bell T. Co. vs. Public Utilities Commission, 301 U. S. 292, 57 S. Ct. 724, 81 L. Ed. 1093." * * *

"The zone of propriety between the extremes of mere conclusion and undue particularity has never been accurately defined. It has been said that all of

the essential facts upon which the order is based must be found. Atchison, T. & S. F. R. Co. v. United States, 295 U. S. 193, 55 S. Ct. 748, 79 L. Ed. 1382; Morgan v. United States, 298 U. S. 468, 56 S. Ct. 906, 80 L. Ed. 1288. On the other hand, the Commission is not obligated to display the weight given by it to any part of the evidence or to disclose the mental operations by which it reached its result. Baltimore & O. Ry. Co. v. United States, 298 U. S. 349, 56 S. Ct. 797, 80 L. Ed. 1209. A candid statement of the reasons and processes by which its findings are reached would be of assistance to the reviewing court, yet the Commission is under no compulsion to expose its methods. Railroad Commission v. Pacific G. & E. Co., 302 U. S. 388, 58 S. Ct. 334, 82 L. Ed. 319. A bare finding of fair value without findings of historical cost and reproduction cost, accrued depreciation, and historical or reproduction cost less depreciation, will not suffice. Each of these items must be specifically found; a figure arrived at by offsets and comparisons without disclosing the sums compared or offset is not in accord with due process. The Minnesota Rate Cases, 230 U. S. 352, 33 S. Ct. 729, 57 L. Ed. 1511, 48 L. R. A., N. S. 1151, Ann. Cas. 1916 A, 18; West v. Chesapeake & P. T. Co., 295 U. S. 662, 55 S. Ct. 894, 79 L. Ed. 1640; Petersburg Gas Co. v. Petersburg, 132 Va. 82, 110 S. E. 533, 20 A. L. R. 542." * * *

"The judicial power authorizes courts to inquire into the legal sufficiency of the evidence in support of administrative findings and to declare void an order where the findings are without basis in the evidence, or are based upon evidence inadequate as a matter of law. Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 30 S. Ct. 417, 54 L. Ed. 608; Norfolk & W. Ry. Co. v. Conley, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745; Ohio Utilities Co. v. Public Utilities Commission, 267 U. S.

359, 45 S. Ct. 259, 69 L. Ed. 656; Banton v. Belt Line Ry. Corp., 268 U. S. 413, 45 S. Ct. 534, 69 L. Ed. 1020."

Wichita Railroad & Light Co. v. Public Utilities Commission of the State of Kansas et al., 67 L. Ed. 124, 130, 260 U. S. 48, 59, 43 S. Ct. 51; Panama Refining Co. v. Ryan, 293 U. S. 389, 430-433; 79 L. Ed. 446, 464, 465, 466.

The said State Supreme Court, in its previous decisions, held that the jurisdiction of the Commission can be invoked only by compliance with statutory methods therefor, and that it is a mere administrative commission and whatever may be its powers, they are surely circumscribed by the laws of the state, and the public policy of the state is manifested by its laws.

State v. Great Northern R. Co., 130 Minn. 57, 61, 62; Dayton Rural Telephone Co. et al. v. N. W. Bell Telephone Co., 188 Minn. 547, 551.

Said State Supreme Court, in this cause, by its reference in its decision, apparently treated as significant its conclusion that the Commission, the Companies, and the Attorney General has acted in good faith. The denial of due process in this matter does not depend upon bad faith on the part of the Commission or that of the other parties to the agreement. The Commission, the Companies and the Attorney General are presumed to have been cognizant of the limitations of law, upon the authority of the Commission, to make and file a rate order.

Judd v. City of St. Cloud, 198 Minn. 590, 611.

The said order of the Railroad and Warehouse Commission of the State of Minnesota, dated May 2, 1939, the said final judgment of the State Supreme Court, in this cause, and said Statute, Sec. 5291, as construed by said State Supreme Court, in this cause, severally conflict with the due process provisions of Section I of the Fourteenth Amendment to the Federal Constitution and deny due process of law to these petitioners as such patrons of the regulated utility and others similarly situated, secured to them by said amendment, and result in the deprivation of property of said petitioners as such patrons of said utility and others similarly situated, without due process of law, in violation of said amendment to said Federal Constitution (Rec. Proc. St. Sup. Ct. pp. 1 to 20 incl., 29, 30).

The record demonstrates the verity of the allegations of the complaint, incorporated therein as one of the grounds for the injunctive relief thereby sought, that the petitioners as such subscribers and all others similarly situated have no plain, speedy or other adequate remedy at law in such regard. This is manifestly the case and requires no further comment.

(Rec. pp 1 to 33 incl. Complaint; pp 14 to 27 incl. order; pp 28 to 33 incl. order; pp 11 and 12)

The petitioners respectfully submit that the Writ of Certiorari prayed for should be issued so that the said final judgment of said State Supreme Court, in this cause, may be reviewed and reversed by the Supreme Court of the United States and the errors herein cited and complained of be corrected, such involving matters of paramount importance to the public.

JOSEPH C. LENIHAN, JOSEPH P. KILROY and CITY OF SAINT PAUL, a municipal corporation,
Petitioners.

DAVID J. ERICKSON

ARTHUR LeSUEUR

HARRY W. OEHLER
Corporation Counsel, City of Saint Paul.

LOUIS P. SHEAHAN
Ass't Corporation Counsel, City of Saint Paul.
Their Attorneys,
City Hall and Court House Bldg.,
Saint Paul, Minnesota.

JAMES F. LYNCH

ANDREW R. BRATTER
County Attorney and Assistant County Attorney respectively, of the County of Ramsey, State of Minnesota.

Of Counsel.
City Hall and Court House Bldg.,
Saint Paul, Minnesota.